Brussels Tax Bulletin

May 2019

IN THIS ISSUE

This month's focus: Danny O'Connell, Associate Director at Kreab, examines the recent steps forward on the much-anticipated Financial Transaction Tax (FTT).

International Digital Tax: EU Finance Ministers Unable to Agree Single Position To Allow EU Speak With One Voice at OECD level.

Three Further Jurisdictions Removed from 3rd Country Tax Blacklist: Political Pressure Yields Concrete Results.

For more information please contact: Sandrell Sultana; sandrell.sultana@kreab.com; +32 27 37 69 46

Step Forward in FTT Process: New Legal Text Circulated After Much Delay

by Danny O'Connell, Associate Director at Kreab

The last few weeks have seen yet more twists and turns in the long-running saga of the famous Financial Transaction Tax (FTT). Casting our thoughts back to December 2018, participating Member States in the group of 10 approved of a new approach put forward by France and Germany which called for a narrower scope of the tax based on the French domestic FTT. A legal text to that effect was expected "in the coming weeks" but didn't appear. At the beginning of 2019, the group of 10 set themselves the goal of reaching agreement on the new approach by the time the EU Finance Ministers met for their ECOFIN meeting on 17th May.

Then while we were waiting for the legal text to appear, on 6th May, France and Germany (again working together, the driving force behind the proposed tax) circulated a working paper entitled "Common Position Paper on the introduction of an EU-wide financial transaction tax (FTT)" to the Council High Level Working Party on taxation (which includes representatives from all 28 Member States). The paper stated that France and Germany would now like the discussions on a European FTT to be expanded so that as many Member States as possible are included.

On Thursday 16th May (the day before ECOFIN), Member States in the group of 10 gathered to discuss the FTT. Another self-imposed deadline for the group of 10 on the FTT had come and passed without agreement, and in this case without even a legal text being put on the table for discussion. Limited progress was made with the meeting focusing on mutualization and legal drafting.

Following the ECOFIN on 17th May however, a draft legal text has been circulated to the group of 10 Member States. The draft legal text reflects the contents of the high-level paper originally circulated by France & Germany in December last. This draft legal text has been a long time in the making but it is clearly far from ready to be submitted as a formal proposal as there are many elements still to be completed.

While it is clearly a marked step forward for the FTT process, even if the group of 10 are satisfied with the drafting, it will not pacify concerns related to the question of what to do with the proceeds from the tax and how they will feed into the EU/Eurozone budget.

Where does all this leave the group of 10 now? Essentially, they are closer to agreement than they were at the start of the year, but there is still a way to go. If the group of 10 can manage to agree on something politically sensitive like mutualising revenues under the tax, then agreeing on a narrow scope would appear very much achievable. On the other hand, the German Minister of Economic Cooperation and Development Gerd Müller (CSU) was reported as saying recently that the current direction of travel on FTT is "almost ineffective" and it would only work on an EU-28 basis.

As has often been the case with the FTT, any step forward is quickly put into the wider context which reminds optimists just how difficult it is to reach agreement on this proposal.

There has also been no formal reaction to the Franco-German call for other Member States to join the group of 10. On first glance this appeared to be outrageously wishful thinking to attract new Member States into the enhanced cooperation process. But as negotiations with the Digital Tax have shown, Member States are aware of the need for increased public revenues, and most are prepared to make the decision to introduce new business taxes. We should not discount the possibility of new countries joining the group.

What happens next? On the 14th June, there is due to be a policy debate on FTT at the ECOFIN meeting in Luxembourg. Significantly, the 18 Member States who are not part of the group of 10 will have the opportunity to ask questions and make comments related to the work. Then on the 20th and 21st June, there will be the European Council summit where the budget is due to be discussed. From the 1st July onwards, Finland will take over the Presidency of the Council. Finland has indicated that the file is in the hands of the group of 10 but they are prepared to facilitate talks if necessary.

No Common EU Approach To OECD Digital Tax Negotiations

Behind closed doors at the recent ECOFIN meeting on 17th May, EU Finance Ministers discussed the possibility of having a common EU approach to OECD discussions. Despite the Commission urging the need for a common position, there was no consensus amongst Member States on having a single approach at OECD level, either on first pillar of OECD work (taxation based on user participation, marketing intangibles and economic presence) or the second pillar (minimum effective taxation).

In a letter to Finance Ministers circulated shortly before the ECOFIN, it was noted that Finance Ministers reaffirmed importance of having discussion on ageing populations including monetary and fiscal policy implications, labour supply challenges and financial inclusion. Similarly, a Commission non-paper stated that existing rules fail to align with new business models and still leave scope for aggressive tax planning. It is essential for the EU that any global agreement also fits the particular needs and situations of Member States and the EU as a whole.

The Commission paper also stated that the EU should have a tax environment fit for the 21st century or "Business Taxation 21." This entails 3 complementary policy objectives: (i) designing a proper allocation of taxing rights, (ii) putting a floor to tax competition and limiting profit-shifting, and (iii) securing a simple and stable business environment while avoiding distortion and double taxation.

Although discussions were expected to be difficult, there was a notable disappointment amongst many that amid the OECD negotiations, the EU is unable to agree to speak with a single voice. This is particularly important because the USA and China have already indicated that they favour an approach at OECD level which imposes taxation at the point of sale, rather than taxation at the point of origin, as France and Germany have explicitly called for. We therefore have the situation that China and the US are aligned, at least at a high level, on the approach to these taxation negotiations, whereas the EU takes the opposite approach and at the same time continues its in-fighting.

In spite of the disagreements, there is support for the Council to continue preparatory work and the Presidency of the Council will attend the upcoming G20 meeting. As a reminder, Finland was one of the Member States which blocked the EU Digital Tax proposal back in March.

EU Finance Ministers are expected to broach the issue once again at their meeting in Luxembourg on 14th June. Following that, on 28th & 29th June, there will be a meeting of G20 Finance Ministers in Fukuoka, Japan where the first OECD progress report on digital taxation will be officially unveiled.

Council Removes 3 More Jurisdictions from 3rd Country Tax Blacklist

At the ECOFIN meeting in May, the Council formally approved the removal of Bermuda, Aruba and Barbados from the list of non-cooperative tax jurisdictions (i.e. blacklist). They will now be placed on the grey-list (i.e. Annex II jurisdictions) and they will have their commitments monitored by the Council Code of Conduct Working Group (with assistance from the Commission).

The list was established in December 2017 and originally contained 17 jurisdictions on the blacklist with a further 47 jurisdictions on the grey-list. They grey-list was set up in order to allow for jurisdictions who had made political commitments to the Council to address the problematic aspects of their tax systems to be remedied. Thus they would not be black-listed but placed in this "purgatory" whereby their political commitments would be monitored closely to see if the promises were translated into action, i.e. concrete legislation.

The list was revised in March 2019, following an in-depth review of the implementation of the commitments taken by third country jurisdictions that are part of the process.

Bermuda aims to come off the grey-list by the end of this year and in order to do so they will need a positive assessment by the Council as to the reforms regarding economic substance for investment funds. If this does not happen by the end of this year, it may happen early in 2020. The Council will conduct two updates of the blacklist & grey-list in 2020.

The EU list is contributing to on-going efforts to prevent tax avoidance and promote good governance principles such as tax transparency, fair taxation or international standards against tax base erosion and profit shifting. There are no firm sanctions against jurisdictions for inclusion on the blacklist apart from the prohibition on EU public money being invested in or through a blacklisted jurisdiction. In addition, Member States are free to choose their own measures such as increased scrutiny on these blacklisted jurisdictions. The Council has repeatedly stressed that it is willing to work and agree on further sanctions that would be automatically applicable to the blacklisted countries but so far this has not materialized.

As a result, 12 jurisdictions remain on the list of non-cooperative jurisdictions: American Samoa, Belize, Dominica, Fiji, Guam, Marshall Islands, Oman, Samoa, Trinidad and Tobago, United Arab Emirates, US Virgin Islands and Vanuatu. Several of these are US territories which is quite notable in the current political environment.

Brussels Tax Bulletin

KREAB BRUSSELS

Address | Rond Point Schuman, 2- 4 | 1040 Brussels

Phone: + 32 2 737 6900 | E-mail: brussels@kreab.com

Twitter: @KreabEU